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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE ALCHINO,

Defendant and Appellant.

H042296

(Santa Clara County

Super. Ct. No. C1486452)

Twenty-two-year-old Enrique Alchino was granted probation after pleading no contest to possession of methamphetamine and trespassing. Among the terms of probation, he was restricted from coming within 50 feet of any school campus during school hours without permission of the school administration or probation. He argues that his attorney was constitutionally ineffective for failing to challenge that condition as unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*). For the reasons stated below, we will affirm.

**I. BACKGROUND<sup>1</sup>**

In June 2014, officers responded to a residence in an area with known gang activity. A “No Trespassing” sign with a Santa Clara County Sheriff’s logo was posted in a front window. Officers had responded to reports of gang activity at that residence in the past, and they knew no one was supposed to be inside the home. They found several

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<sup>1</sup> The factual summary is drawn from the preliminary hearing testimony.

people at the residence, including defendant, who had a usable amount of crystal methamphetamine in his possession. Defendant was an active member of the Sureño gang, with visible tattoos identifying him with that gang. Several individuals found with defendant were also known Sureño gang members, and the house was a known gathering location for suspected gang members.

Defendant was charged with possessing methamphetamine, a felony (Health & Saf. Code, § 11377, subd. (a), count 1); trespass by entering and occupying property, a misdemeanor (Pen. Code, § 602, subd. (m), count 2); and unauthorized entry of a dwelling, a misdemeanor (Pen. Code, § 602.5, subd. (a), count 3). The information alleged that defendant committed counts 2 and 3 for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of Penal Code section 186.22, subdivision (d).

At the change of plea hearing, count 3 was amended to be charged as a felony. Defendant pleaded no contest to counts 1 and 3, and he admitted the gang enhancement allegation as to count 3. At sentencing, the court reduced count 1 to a misdemeanor under Penal Code section 17, subdivision (b), and imposed 341 days in county jail with credit for time served. The court suspended imposition of sentence on count 3 and placed defendant on four years' probation with several conditions related to drugs, alcohol, and firearms. Defendant was ordered to stay 100 yards away from the house where the trespass occurred.

The court imposed gang-related conditions recommended by the probation department. Specifically: Defendant was ordered to provide passwords to all electronic devices within his custody or control and any social media websites, and to submit to warrantless searches of those devices and websites. Defendant was required to register as a gang member under Penal Code section 186.30. Defendant was prohibited from possessing or wearing clothing or insignia known to be affiliated with gang membership, associating with known gang members, being in areas known to be related to gang

activity, attending a court proceeding when a gang member is present except under specified circumstances, and knowingly being on or within 50 feet of any school campus during school hours unless enrolled or with the permission of the school administrator or probation officer.

## **II. DISCUSSION**

Defendant argues that his attorney was constitutionally ineffective for failing to object to the probation condition requiring him to stay away from schools.<sup>2</sup> Ineffective assistance of counsel requires a showing that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced by the deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). "When a defendant makes an ineffectiveness claim on appeal, the appellate court must look to see if the record contains any explanation for the challenged aspects of representation. If the record sheds no light on why counsel acted or failed to act in the manner challenged, 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [citation], the case is affirmed [citation]." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) Prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.) A reasonable probability is "a probability sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

### **A. DEFICIENT PERFORMANCE**

According to defendant, a reasonably competent attorney would have objected to the challenged condition under *Lent*, which holds that a condition "which requires or

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<sup>2</sup> Defendant acknowledges that he has forfeited any direct challenge to the probation condition by failing to object in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237.)

forbids conduct which is not itself criminal is valid if that conduct is reasonably related to the crime of which the defendant was convicted or to future criminality.” (*Lent, supra*, 15 Cal.3d at p. 486.) Defendant argues that there is no relationship between the current offenses and the stay-away order because the offenses were not committed on or near a school and they did not involve school-age children or students. Citing *In re D.G.* (2010) 187 Cal.App.4th 47, he argues that the condition is not related to future criminality for similar reasons—that his criminal conduct is unrelated to school grounds, school-age children, or students.

In *In re D.G.*, a juvenile was sentenced to probation for first degree burglary and receiving stolen property. (*In re D.G., supra*, 187 Cal.App.4th at p. 53.) The 17-year-old offender broke into a home while the residents were away, stealing a camera and a safe. (*Id.* at pp. 50–51.) His prior offenses included selling marijuana to an undercover police officer and car burglary. (*Id.* at p. 51.) As a condition of probation, the offender was prohibited from coming within 150 feet of any school campus other than a school he was attending. (*Id.* at p. 50.) The appellate court determined that the condition was unrelated to the offender’s current or past crimes because those crimes had not been committed on school grounds or involved school-age children or uniquely juvenile conduct. It further concluded that the condition could not support the rehabilitative function of deterring future criminality because nothing in the offenses themselves or in the offender’s personal history demonstrated a predisposition to commit crimes near school grounds or against children. (*Id.* at p. 53.) The *In re D.G.* court narrowed the condition to prohibit the offender from “ ‘be[ing] on the campus or grounds of any school unless enrolled, accompanied by a parent or guardian or responsible adult, or authorized by the prior permission of school authorities’ ” and by requiring the offender to register with the school administration should he enter a public school campus. (*Id.* at pp. 54, 56 & fn. 6.)

As narrowed, the condition conformed with Penal Code section 627.2, restricting outsiders from entering school grounds without registering with the school principal.<sup>3</sup>

Unlike the offender in *In re D.G.*, here defendant admitted that his trespassing was “committed for the benefit of, at the direction of, or in association with [a] criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]” (Pen. Code, § 186.22, subd. (d).) A criminal street gang is defined as “any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more ... criminal acts ... and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (Penal Code, § 186.22, subd. (f).) City of San Jose police officer Anthony Kilmer, who testified at the preliminary hearing as an expert in Hispanic street gangs, identified defendant as an active a member of the Sureño street gang, a gang whose primary activities include vandalism, assault with a deadly weapon, murder, and possession and sale of illegal drugs.

Officer Kilmer testified that members join the gang at a young age, and that there is a Sureño gang presence at a high school in the local area where violent incidents involving gang rivals have occurred. He explained that the Sureño gang claims areas and neighborhoods as its territory in San Jose, and that it competes with the presence of its rival Norteño gang. He noted that a gang’s reputation and power help the gang recruit and retain members.

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<sup>3</sup> Penal Code section 627.2 provides, “No outsider shall enter or remain on school grounds during school hours without having registered with the principal or designee, except to proceed expeditiously to the office of the principal or designee for the purpose of registering. If signs posted in accordance with Section 627.6 restrict the entrance or route that outsiders may use to reach the office of the principal or designee, an outsider shall comply with such signs.”

In our view, trial counsel’s performance was not constitutionally deficient. To the extent the contested probation condition encompasses conduct beyond the scope of Penal Code section 627.2, the condition is reasonably related to future criminality under *Lent*. The stay-away order prevents defendant from perpetrating or being the victim of rival gang violence that has been known to occur on high school premises.<sup>4</sup> (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 626 [upholding probation condition aimed at ensuring the defendant “would not be present at confrontational situations between rival gangs” as “hostility among different gangs is often an underlying cause of criminal activity.”].) By prohibiting his presence on or near a school campus during school hours, defendant is further prevented from intimidating students, promoting the gang’s reputation, and recruiting children into the gang.

Trial counsel was not deficient for failing to object to the challenged condition. First, the condition was well within the trial court’s discretion. (See *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 [recognizing the trial court’s broad discretion to impose probation conditions to foster rehabilitation and to protect public safety].)<sup>5</sup> Second, trial counsel may have been of the view that any objection would have been futile, as the court declined to change any gang conditions even after being informed by trial counsel that defendant typically stayed with his parents in a neighborhood that might be considered to be an area of gang activity.

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<sup>4</sup> Even though defendant was identified as an active member of the Sur Santos Pride subgroup, he bore a tattoo affiliated with a different Sureño subgroup involved in the high school rival violence.

<sup>5</sup> The Legislature has found that members of violent street gangs “threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods,” and that gang activities “present a clear and present danger to public order and safety[.]” (Pen. Code, § 186.21.)

**B. PREJUDICE**

Defendant also has failed to show prejudice. Given the absence of any evidence in the record demonstrating a need for defendant to come within 50 feet of a school campus during school hours, and the court's refusal to modify the gang conditions to accommodate defendant's living arrangement, it is not reasonably probable that the trial court would have removed or modified the school stay-away condition had an objection been raised.

**III. DISPOSITION**

The judgment is affirmed.

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Grover, J.

**WE CONCUR:**

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Rushing, P.J.

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Premo, J.